BLANK

PAGE

Office-Supreme Court, U.S.
FILED
DEC 30 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 779
OCTOBER TERM, 1966

JAMES F. SHORT, STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON, MARK O. HATFIELD and ROBERT Y. THORTON,

Appellants,

v.

NESS PRODUCE CO., an Oregon Corporation,

Appellee.

On Appeal From the United States District Court for the District of Oregon

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

ROBERT Y. THORNTON
Attorney General
State of Oregon
HAROLD E. BURKE
DON PARKER
Assistant Attorneys General
Supreme Court Building
Salem, Oregon 97310
Attorneys for Appellants

J. BRADLEY COLBURN
JAMES H. LUNDQUIST
RUFUS E. JARMAN
25 Broadway Street
New York, N. Y. 10004
THEODORE B. JENSEN
623 S. W. Oak Street
Portland, Oregon 97205
Attorneys for Appellee

BLANK

PAGE

INDEX

	Page
The Appellee's Statement of the Case Is Misleading	1
The Trial Court's Decision Is Not in Conformity with the Clear Rulings of This Court	3
Conclusion	5

MISCELLANEOUS CITATION

Consumer Report, Volume 33, January, 1967	2

BLANK

PAGE

In the Supreme Court of the United States

No. 779
OCTOBER TERM, 1966

JAMES F. SHORT, STATE DEPARTMENT OF AGRICULTURE OF THE STATE OF OREGON, MARK O. HATFIELD and ROBERT Y. THORNTON,

Appellants,

v.

NESS PRODUCE CO., an Oregon Corporation,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

Appellants, pursuant to Rule 16 (3) of the Revised Rules of the Supreme Court of the United States, submit this, their brief, in support of the contention that the motion to affirm of the appellee is without merit.

THE APPELLEE'S STATEMENT OF THE CASE IS MISLEADING

The appellee's statement of the case, presented on pages 2 and 3 of said motion, necessitates clarification and correction.

1. The trial record of this cause, whether evidence or agreed facts in the pre-trial order, is devoid of any data supporting the appellee's contentions that the meat imported by the appellee is subject to "rigorous testing" at the point of origin, or that "*all* such meat" (emphasis

supplied) is again inspected and passed for purity at the time of entry into the United States. In regard to the latter contention, the inspection is a statistical sampling of a small percentage of the imported meat, when it is received in its frozen state.

Exemplary of the lack of rigidity in the imported meat inspection process is a report in Consumer Report, Volume 33, January, 1967,[1] wherein it is stated that several million pounds of horsemeat imported from Mexico, and *having passed inspection requirements before entering the United States,* was passed off as frozen, boneless beef.

Additionally, nothing in the record indicates the appellee is an "inspected plant in the United States" so as to be subjected to any inspection by the federal government.

2. The labeling and record-keeping requirements are

---

[1] "A substantial number of consumers have unwittingly been eating horsemeat in the form of frankfurters and sausage, a recent case in a Pittsburgh Federal court revealed. The case, brought by the U. S. Department of Agriculture, dealt with the misuse of several million pounds of horsemeat shipped in from Mexico and elsewhere during 1962 through 1964. This meat was repackaged as frozen boneless beef and sold, with counterfeit Government inspection marks and false labeling, to processors in Ohio, Pennsylvania, and Maryland. Sol Braunstein, Barry Dvorin, and Robert Dvorin each pleaded guilty to three charges, one count each of conspiracy, of violating the Horse Meat Act, and of violating the Meat Inspection Act; their sentences are pending. Under Grand Jury indictment, but yet to be tried, are Ralph Gasparello and three other men.

"Gasparello and Robert Dvorin are also still under indictment in a similar case involving Merkel brand meats ('The Docket,' May 1965). However, the Merkel products include meat that was diseased or otherwise unfit for human consumption, it was charged; the meat in the present case had passed inspection requirements before entering this country."

not imposed specifically by the Act in question, but rather by the administrative regulations promulgated thereunder. The Oregon Act clearly designates the Department of Agriculture of the State of Oregon as the rule-making agency.[8] It is important to note that such administrative regulations as relied on herein were *not* in effect at the time of commencement of the instant cause, having been promulgated thereafter on August 16, 1965.[9]

The trial court, itself, recognized such administrative regulations were only advisory in nature as evidenced by its statement:[10]

> "The administrative regulations, *while not controlling here,* confirm the true purpose of the statute." (Emphasis supplied)

The administrative rules are the only specifications as to size, location, type, etc., of labeling and record-keeping and these rules are subject to repeal, amendment and modification by summary administrative action. The appellee, as the trial court, erroneously assumes the Oregon Act to designate the "cost of compliance" basis.

THE TRIAL COURT'S DECISION IS NOT IN CONFORMITY WITH THE CLEAR RULINGS OF THIS COURT

To establish the lack of substantial federal questions herein, the appellee describes numerous Supreme Court

---

[8] Jurisdictional Statement, Appendix C, p. 34.

[9] Jurisdictional Statement, Appendix A, p. 25; footnote [3] of opinion.

[10] Jurisdictional Statement, Appendix A, p. 28.

decisions as uniform in concept or as patently distinguishable from the present dispute.

1. The analysis by the appellee of the cases decided by this Court[8] is a superficial distinguishment of factual situations. One cannot judicially conclude that affirmative misrepresentation is not the same as non-disclosure; that lard sales are different than meat sales; or that avocado sales are unique, without probing beyond the surface.

An in-depth analysis of the judicial reasoning involved in such cases is essential to determine the comparative factors to be applied in the conflict of state regulatory power versus freedom of interstate commerce. The appellants' contention that real, substantial federal questions are presented demanding this Court's consideration is buttressed by such cases—not negatived thereby.

2. Additional cases cited by the appellee[9] are only demonstrative of the clear, accepted fields of interstate commerce activities already subjected to state commer-

---

[8] Motion to affirm, pp. 6-7, cases cited: *FTC v. Algoma Lumber Co.*, 291 US 67 (1934); *Standard Stock Food Co. v. Wright*, 225 US 540 (1912); *Hutchinson Ice Cream Co. v. Iowa*, 242 US 153 (1916); *Armour & Co. v. North Dakota*, 240 US 510 (1916); *Huron Portland Cement Co. v. Detroit*, 362 US 440 (1960); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132 (1963).

[9] Motion to affirm, pp. 8-9; cases cited: *Minnesota Rate Cases.* (*Simpson v. Shephard*), 230 US 352 (1913); *Hebe v. Shaw*, 248 US 297 (1919); *Hygrade Provision Co. v. Sherman*, 266 US 497 (1925); *Mintz v. Baldwin*, 289 U S346 (1933); *Pacific States Box & Basket Co. v. White*, 296 US 176 (1935); *Bayside Fish Flour Co. v. Gentry*, 297 US 422 (1936); *Bourjois, Inc. v. Chapman*, 301 US 183 (1937); *Patapsco Guano Co. v. Bd. of Agriculture*, 171 US 345 (1898).

cial regulation. Contrary to appellee's assertions, these are not *exclusive* areas of activity and do not negative "source of origin" as also being a necessary and proper area of consumer advice to be validly required by state enactments.

The position of the appellee in this regard lends further support to the appellants' contentions that a necessity exists for this Court to determine the guideposts to which the several states' legislatures should adhere in their regulation of commercial activity.

CONCLUSION

The appellee's motion to affirm is ill founded in fact and law as clear, substantial questions demanding this Court's cognizance do exist.

The appellants reassert their request that this Court undertake plenary jurisdiction of this matter with the submission of briefs and oral arguments.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General
State of Oregon

HAROLD E. BURKE

DON PARKER
Assistant Attorneys General
Supreme Court Building
Salem, Oregon 97310
Attorneys for Appellants